

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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February 28, 2006

Senator Liebham:

1. Proposed s. 6.22 (5m) and related provisions, which permit military electors, as defined in s. 6.22 (1) (b), stats., to have their ballots delivered and counted after election day as long as they are postmarked by election day, would, in cases where a recount is requested, require canvasses to be reopened before a recount could proceed. It is difficult to say how much time might be used in the reopening of a canvass. However, because under current law most local elective officials take office either 7, 14 or 21 days after the date of the spring election, it is difficult currently in many cases to complete a recount in time for the winner to take office on the appointed day. The change could make it somewhat more difficult than it is currently. If an elective official cannot take office on time, it can have an effect upon who is appointed to other offices (such as county board chair or member of a city commission) whose terms begin shortly after the term of the elective official who appoints the official.

2. Also with respect to proposed s. 6.22 (5m) and related provisions, currently, under s. 7.15 (1) (cm), stats., municipalities must transmit absentee ballots to all absentee voters who have requested ballots, including the voters who are affected by this draft, no later than 21 days before the spring election and no later than 30 days before the general election. Although calendar fluctuations can make this task more difficult or less difficult to complete within the time prescribed by law, as a general rule the time allotted for canvassing of the spring and September primaries and ballot preparation for the spring and general elections is used completely. Therefore, under this draft it is likely that, in municipalities where military electors do not return absentee ballots by election night, unless municipal clerks and boards of election commissioners exercise an unusual degree of initiative and municipalities agree to take on some additional costs for expedited printing service, absentee ballots could be distributed as late as approximately 15 days before the spring election and as late as approximately 24 days before the general election. This will make it more difficult for these ballots to be returned through the world mail system by election day. The voters who are affected by this draft will have extra time to return their ballots, but these voters could still be impacted to some degree by this change if their current ballot transit times are less than approximately seven days.

3. Proposed s. 6.22 (5m) permits the ballots of military electors to be counted under certain conditions if received after election day. Proposed s. 6.86 (1) (c) provides a later

deadline for military electors to apply for an absentee ballot than is provided for other electors. The proposed treatment of s. 6.86 (1) (b), stats., similarly provides a later deadline for indefinitely confined electors to apply for an absentee ballot than is provided for other electors. Although these provisions generally provide a dispensation, the effect of the provisions is to create a procedure under which the ballots of electors may either be counted or not counted or absentee ballots may be provided or not provided based upon the status of the electors, which could raise an equal protection issue. The U.S. Supreme Court has sometimes approved distinctions made by states in the treatment of absentee voters. However, the Court has said that because voting is a fundamental right, any distinction made by a state will be subject to close scrutiny. See *McDonald v. Board of Election Commissioners*, 89 S. Ct. 1404, 1407 (1969), in which the Court, after applying this scrutiny, nevertheless permitted Illinois to make a distinction based upon prisoner status. One argument that could be advanced in support of this draft is that national security requires disparate treatment of the ballots of military electors, as defined in this draft, and that the conditions under which those electors must operate may prevent them from taking advantage of the same procedures for expeditious absentee balloting that other electors can conveniently use. It may also be argued that the type of treatment proposed in this draft is not invidious, which may distinguish it from other situations. It is possible to argue, however, that the class of electors that is affected by this draft may not be drawn with sufficient closeness to provide the state with a sufficient basis for treating their ballots differently in every case. Because the Court does not appear to have ruled on this point, it is not possible to predict how the issue posed by this draft will be assessed.

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